No. 94-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

TOWN AND COUNTRY ELECTRIC, INC., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. Throughout its 75 year history, the ACLU has supported the statutory rights of employees to organize and to freedom of speech without fear of reprisal. In furtherance of that view, the ACLU has participated as *amicus curiae* in cases before this Court involving the democratic rights of workers under federal labor law, *see, e.g., Wooddell v. International Brotherhood of Elec. Workers, Local No. 71*, 502 U.S. __, 112 S.Ct. 494 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

STATEMENT OF THE CASE [2]

Respondent Town & Country Electric, Inc. is a large nonunion electrical contractor based in Wisconsin. In early September, 1989, Town & Country was awarded a contract to perform electrical renovation work at the Boise Cascade paper mill in International Falls, Minnesota. Respondent subsequently learned that it was required to employ at least one Minnesota-licensed electrician for every two unlicensed electricians working at the job site. In order to meet this requirement, respondent engaged a temporary employment agency. Respondent made clear, however, that applicants had to be "able to work a merit" -- meaning nonunion --

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] This statement of the case is taken from the Board's decision.

shop, and applicants who contacted the agency were specifically asked whether they would work nonunion.

On September 7, two Town & Country officials arrived in Minneapolis for a day of interviews. They interviewed a nonunion electrician who had a scheduled appointment, but did not hire him. The other dozen or so electricians present did not have scheduled appointments, although one, Malcolm Hansen, was told by the receptionist that he could be interviewed anyway. The applicants were all told that the job was nonunion, but nevertheless expressed interest in the work.

Town & Country officials then asked an agency official how these particular applicants knew of the job openings. "I think they're union," the agency official said, whereupon Town & Country refused to do any further interviews. Hansen protested, having already been told to report for an interview. Town and Country relented, and Hansen was hired, beginning work five days later. On the job site, he solicited his co-workers to join the union, and subsequently was fired.

The applicants who were denied interviews were members of the International Brotherhood of Electrical Workers and had been authorized by the union to work nonunion jobs in order to organize employees. Two of the applicants were paid union organizers; the remainder were not union employees. At least some of the applicants expected to receive financial support from a union fund established to reimburse pay differentials incurred by union members who were "salting" nonunion jobs in order to organize the workforce. Nothing in the record suggests that on September 7, when respondent refused to interview these applicants, it knew that they had any kind of financial relationship with the union, or that they had applied for the jobs essentially at the behest of the union.

The Board found that respondent fired Hansen because of his organizational activities on behalf of the union. The Board further found that respondent's refusal to interview union members, as well as the discriminatory discharge of Hansen, violated §8(a)(3) of the NLRA, which prohibits employers from discrimination that "discourage[s] membership in any labor organization." The Court of Appeals for the Eighth Circuit denied enforcement of the Board's order, holding that the discharged workers were not "employees" under §2(3) of the Act because they were "under the control" of the union or expected compensation from the union.

SUMMARY OF ARGUMENT

This case raises a question of statutory construction essential to the right of workers to organize and to exchange information about unions with co-workers: whether §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), excludes from its protection job applicants and employees whose organizing activity is encouraged or compensated by a union. In the real world of nonunion workplaces, the issues before the Court are these: Can an employer refuse to interview an applicant who is a union member and has been encouraged by the union to work a nonunion job? Can an employer refuse to interview an applicant who is a union staff member and expects reimbursement from the union for any pay differential incurred by working a nonunion job? And, can an employer fire an otherwise satisfactory worker who is also a paid union organizer?

The clear and unambiguous language of §2(3) of the NLRA includes "any employee," other than a few exceptions not relevant here. And this Court has consistently recognized that job applicants, as well as those who have been hired, fit comfortably within this provision. Nothing in the language of that section supports respondent's contention that an employee loses his protection under §2(3) -- protec-

tion explicitly designed to prevent employers from retaliating against union members in the hiring and firing process -- because of his financial or associational relation with the union. On the contrary, as the National Labor Relations Board reasonably found, when Congress intended to exclude particular categories of workers from the protective scope of §2(3), it explicitly provided for that result in the language of the Act.

The Board deals at length with the appropriate deference that is due an administrative agency's reasonable interpretation of an unambiguous statute. We agree that the statute is unambiguous. In addition, however, the legislative purpose of the NLRA supports the Board's reading of the statutory text. The NLRA was intended to facilitate self-organization, which this Court has recognized as "the central purpose of the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941). In pursuit of this goal, Congress established face-to-face communication between one employee and another at the job site as the central way for workers to receive information about unions and to effectuate their right to self-organize. Through the personal encounter with co-workers at the job site, workers obtain the knowledge that they need to make informed and free decisions about whether to choose or reject a union. It is a kind of knowledge and interaction that cannot be duplicated from other sources, whether the union, the media or literature.

This Court has repeatedly affirmed the primacy of face-to-face communication between co-workers on the job to achieve the statutory goal of self-organizing, and a half century of law concerning the organizing process has been built on the centrality of this workplace encounter between employees. To deprive employees of union resources that they need to engage in self-organization would have a chilling effect on rights explicitly protected under the Act.

The decision below rips an exception out of the protective fabric of the Act that would thus "inevitably operate[] against the whole idea of the legitimacy of organization." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 185. Furthermore, because the rule of exclusion adopted by the court below is neither self-defining nor well-defined, it will inevitably invite abuses during the hiring and screening processes that this Court has repeatedly condemned. It also jettisons the traditional balancing test that this Court has employed when weighing the employee's right to speak and associate against the employer's managerial and property interests.

In such a balance, the employer's interest must be carefully defined. Respondent in this case has put forward no legitimate interest to justify the withholding of statutory protection. The only asserted interest on this record is the employer's preference not to hire union sympathizers -- whether members, staff or paid organizers -- because they are in conflict with his desire to maintain a nonunion workplace. Unlike a nonemployee union organizer who seeks access to an employer's property, the employee organizers in this case seek only to be treated equally in the hiring and firing process with their nonunion colleagues. A conflict between these union sympathizers and the employer can be said to exist only if union organizing is incompatible with the employer's right to run his business. That premise, however, has been definitively rejected by both Congress and this Court.

ARGUMENT

The question whether §2(3) of the NLRA accords protection to employees who are or may be compensated by an organizing union for their organizing activity, and to applicants who seek to work a nonunion job at the behest of a labor organization, implicates two of the most critical purposes of the Act. First, the right of employees to self-organize lies at the heart of the NLRA. Second, face-to-

face communication between employees at the job site is the primary way that workers receive information about unions, allowing them to choose freely whether to accept or reject a union. In light of these statutory goals, the Board reasonably determined that workers retain protection under the Act as "employees," even if they have an associational or financial relation to an organizing union.

I. EMPLOYEE SELF-ORGANIZATION LIES AT THE CORE OF THE NATIONAL LABOR RELATIONS ACT

This Court has repeatedly recognized that, in enacting the NLRA, Congress established "workers' self-organization" as "the central purpose of the Act." *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. This choice was deliberate, but it was not inevitable. At least two other options were available: national labor policy could have been founded on the principle of compulsory representation or, alternatively, on the principle that the employees' right to organize was dependent on the employer's acquiescence. By rejecting these two extremes, Congress implicitly recognized that the principle of employee self-organization is more consistent with basic constitutional values of individual autonomy, freedom of association, and limited government.[3]

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[3] The idea of compulsory representation of employees claimed considerable political support in the early 1930's. For example, the National Recovery Administration, held unconstitutional by this Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), included Codes of Industry that the President might impose on unwilling industries. *See generally* James Q. Whitman, "Of Corporatism, Fascism, and the First New Deal," 39 Am.J.Comp.L. 747, 764-66 (1991). Today, most European countries maintain statutory programs of compulsory employee representation. *See generally* Richard B. Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion

(continued...)

These values are reflected in the language of the NLRA, which makes it illegal for an employer to refuse to recognize a union that has been duly organized by the employees. §8(a)(5), 29 U.S.C. §158(a)(5). Before the Act, the employer had sole discretion over whether a particular job would be "union" or "nonunion." The NLRA, however, assigns the decision whether to unionize to the employees themselves. Section 9(a) of the NLRA thus provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

29 U.S.C. §159(a).

In enacting the NLRA, Congress thus definitively rejected the idea of an employer-created labor organization, on the one hand, and a government-created labor organization, on the other. For nearly sixty years, the Act has been understood to mean that American employees become organized if, but only if, they freely choose a union for themselves. Although employee self-organization imposes certain costs on both managers and unions, it serves important

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[3] (...continued)
Labor Market," in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 13, 45-56 (Bruce E. Kaufman & Morris M. Kleiner 1993). Studies indicate that the existence of such work councils helps preserve union representation during periods of economic downturn. *See* Lowell Turner, DEMOCRACY AT WORK: CHANGING WORLD MARKETS AND THE FUTURE OF LABOR UNIONS 223 (1991). In short, the right to employee self-organization, as opposed to compulsory representation, comes at a price that can be measured in organizing costs, decreased union density, insecurity of union tenure, and difficulties of mobilizing collective action.

public and constitutional ideals, establishing democratic procedures in industry (and correlative rights of association and speech for employees and employers), while maintaining individual autonomy and limited government.

Proponents of the NLRA put forward this understanding of unionization as an example of a larger vision of representative democracy. Not surprisingly, it is the constitutional analogy to which courts and commentators often turn in order to interpret the Act. As Senator Robert F. Wagner, the Act's major proponent, put it:

> The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood.

Milton Derber, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965 321 (1970), quoting N.Y. Times, Apr. 13, 1937, at 20. Senator Wagner argued that the NLRA constituted "the only key to the problem of economic stability if we intend to rely upon democratic self-help by industry and labor, instead of courting the pitfalls of an arbitrary or totalitarian state." Joseph Huthmacher, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 195 (1968). Employer-created organization would not bring democracy to industry, while compulsory organization would do so only at the risk of an unacceptable increase in government power. To the 74th Congress which enacted the NLRA, employee self-organization best enacted their vision of constitutional democracy. Numerous aspects of labor law follow directly from this legislative choice.

II. FACE-TO-FACE COMMUNICATION BETWEEN EMPLOYEES IS CRITICAL TO THE RIGHT TO SELF-ORGANIZATION WHICH LIES AT THE CORE OF THE NLRA

In an unbroken line of decisions stretching back over a half century, this Court has consistently recognized that the right of employees to self-organize depends on access to information concerning the union, and that the primary vehicle for acquiring such information under the NLRA is the face-to-face encounter between employees at the workplace, as a worker who favors the union communicates his message to a co-worker and solicits him to join the union.

To be sure, an employee may be able to obtain information about unions from other sources: the union organizer outside company property, the public meeting, or mass media and literature. Organizing through such sources of information is not, and could not constitutionally be, restricted. But remote organizing of this kind is no substitute, in law or practice, for the human, personal encounter at the worksite between two employees, and this Court has never recognized it to be such a substitute. The Court has reached this result not because self-organizing based on face-to-face employee communication is an undiluted benefit to unions. Rather, the primacy of the face-to-face employee solicitation enacts and reflects important democratic values. In particular, it defines the kind of labor organizations and labor representations that our democracy wants to have: labor organizations that are the creation of their members and that respond to those members' concerns.

For this reason, this Court has consistently accorded protection to the workplace encounter between employees, on nonworking time, imposing restrictions only after carefully balancing the employee's right to speak and associate against the employer's property or managerial interests. Thus, employees may not be disciplined for engaging in

union solicitation on company property, so long as this is during their time, not working time. For example, in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), an employee was discharged for passing out applications for union membership during his lunch period; others were discharged for wearing union buttons; while others were suspended for distributing union literature in the company-owned and fenced-in parking lots. This Court enforced the Board's order that all such employees were discriminatorily discharged in violation of what is now §8(a)(3) of the NLRA. As the Court explained, the dominant purpose of the NLRA:

> is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster.

324 U.S. at 798.

More recently, this Court enforced the Board's order that the reprimand of a medical technician for distributing a union newsletter at a hospital's cafeteria, largely (though not exclusively) patronized by employees, similarly violated the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). As the Court wrote:

> We have long accepted the Board's view that the right of employees to self-organize and bargain collectively established by §7 of the NLRA, 29 U.S.C. §157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.

Id. at 491 (footnote omitted). So fundamental is the employee's right to engage in organizational activities at the jobsite that this Court has held ineffective purported waivers

of that right by a union:

> The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to employees . . . . Congress declared in Section 1 of the Act that it was the policy of the United States to protect "the exercise of full freedom of association."

NLRB v. Magnavox Co., 415 U.S. 322, 325-26 (1974).

The protection of jobsite, face-to-face solicitation between employees should not be seen as an interest-group payoff to labor unions. Union power would be far more effectively institutionalized through a regime of compulsory representation of employees, but that is not the labor scheme that Congress created in 1935. By contrast, employee self-organizing, the scheme that Congress did create, is risky for unions, as well as employees. The official commission studying our nation's employment laws recently found that illegal firing of union supporters takes place in "one in every four elections, victimizing 1 in 50 union supporters." U.S. Department of Labor and Department of Commerce, Commission on the Future of Worker-Management Relations, *Fact Finding Report* 70 (May 1994). This figure does not include discharges, such as the discharge of Malcolm Hansen in the instant case, which the Board found was for his union organizing, but which occurred at a time when no union election was pending.

By building the right to self-organization on the human encounter between two employees, the NLRA enacts powerful democratic constitutional values: democratic participation in industry, freedom of speech, freedom of association, private ordering of the economy, and limited government. This package of values has been largely stable for decades, and should not be undone by this Court without explicit

congressional authorization and over the objections of the agency charged with administering the statute.

Indeed, this Court has never deviated from the fundamental principle that the Act protects face-to-face solicitation at the workplace, between two employees, on the subject of unions. To be sure, this principle is no more absolute than other principles of labor law, and may at times yield to legitimate employer property or managerial interests. For example, the right of hospital employees to talk "union," even on their own time, may be kept out of corridors and sitting rooms near patient care areas. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). But the Court has never jettisoned a balancing approach that carefully weighs competing interests, in favor of a vague, sweeping, and overbroad exclusion of persons who are plainly employees from the protections of the NLRA.

III. RESPONDENT DISCRIMINATED UNLAWFULLY WHEN IT REFUSED TO HIRE UNION MEMBERS AND WHEN IT DISCHARGED AN EMPLOYEE FOR ACTIVITIES ON BEHALF OF A LABOR ORGANIZATION

Federal labor law takes no position on whether respondent's employees should be represented by a labor organization. That choice is the employees' to make. Federal labor law is not necessarily violated if that job is union, or nonunion. Nothing is more fundamental to federal labor law, however, than the proposition that Town & Country employees have a right to make a choice to accept or reject a union for themselves; that their right to decide their union status involves certain employee rights to engage in jobsite union solicitation; and that the employer may not interfere with these rights absent substantial interests nowhere present

on this record. *See* Point V, *infra*.

Respondent clearly preferred that its renovation job at the Boise Cascade mill, like its other jobs, be performed nonunion. Respondent's preference is not illegal, and the NLRA protects Town & Country's desire to hold it and express it. Town & Country has the right, for example, to address its employees at any time on the subject of unionization. It may state its preferences against unions, present information about unions, or predict the likely impact of unionization on its business, so long as its remarks do not threaten or coerce. Section 8(c), 29 U.S.C. §158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

What respondent may not do under the NLRA is to decide for itself that a given job will be nonunion, and then prevent employees from hearing about unions, through the combined scissors of discrimination in hiring, followed by the discriminatory discharge of lawfully hired employees once they begin union organizing. No proposition of federal labor law is more fundamental. Permitting an employer to decide unilaterally whether a job will be union or nonunion removes the decision to self-organize from the employees, where Congress -- consistent with its understanding of constitutional values -- definitively placed it sixty years ago.

This Court has repeatedly recognized that §2(3) of the NLRA extends protection to "any employee," other than those specifically listed by Congress as outside the statute. Indeed, the statutory term "employee" must be read to include no exceptions other than those placed there by Congress or constitutionally required. *See NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979). As this Court explained in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177:

> To circumscribe the general class, "employees," we must find authority either in the policy of

the Act or in some specific delimiting provision of it.

> Not only is the Act devoid of a comprehensive definition of "employee" . . . but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in §2(3), had behind it important practical and judicial experience. "The term 'employee'," the section reads, "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . ." This was not fortuitous phrasing. It has reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies.

Id. at 191-92.

The Court in *Phelps Dodge* thus held that applicants for employment are statutory employees within §2(3), and protected against discrimination. In reaching this result, the Court recognized that "[d]iscrimination against union labor in the hiring of men is a dam to self-organization at the source of supply." 313 U.S. at 185. The Court's holding that job applicants are statutory employees reflects the application of the broader interpretive principle that §2 of the Act should, consistent with constitutional requirements, admit of no exception other than those drafted by Congress.

The treatment in *Phelps Dodge* of job applicants as

"employees" respects three different levels of congressional intent, all equally relevant to the instant case. At the statutory level, it protects those individuals whom Congress intended to protect in enacting the NLRA. At the institutional level, it circumscribes the power of the Court and the Board within the limits of the congressional design. And at the policy level, it goes beyond protecting specific individuals and rather protects Congress' entire plan for employee self-organization.

The Board's Order finding a violation of the Act in this case served the same three fundamental principles. Here, as in *Phelps Dodge*: *"The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization."* 313 U.S. at 185 (emphasis added). Furthermore, by finding that respondent's hiring and firing of union members violates the Act, the Board also protected the rights of Town and Country's nonunion employees to make their own choice about unionism and to receive information about unions from fellow employees.

The employees' right to receive information from co-workers about unions is substantially abridged by the decision below. This Court has repeatedly recognized that a "prohibition on compensation unquestionably imposes a significant burden on expressive activity." *U.S. v. National Treasury Employees Union*, __ U.S. __, 63 U.S.L.W. 4133, 4137 (Feb. 22, 1995). *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). If employees are to exercise the choice that Congress placed with them, they must have access to information at the workplace from co-workers who favor the union. A prohibition on information from workers who are compensated for their speech activity represents the same kind of burden on expression that this Court recognizes in the constitutional context. This does not mean, of course,

that any conceivable source of information for employees is protected. It does mean, and has meant for a half century, however, that face-to-face solicitation at the workplace is protected unless employers can show, as this employer did not and could not, substantial countervailing interests.

IV. THE COURT OF APPEALS' CONTRARY RULE WOULD CHILL EMPLOYEE RIGHTS

The Eighth Circuit's decision in this case found that none of the victims of Town & Country's discrimination was a statutory "employee": not the applicants who were paid union organizers; not the applicants who were encouraged to apply for nonunion work; and not Hansen, the discharged worker, who later received some reimbursement from the union. Each of these individuals, the court of appeals found, was "under Local 292's control," and therefore not within the Act's protection of "any employee." The lower court's decision thus denies protection to individuals far beyond the stereotyped "paid union organizer." In support of this broad rule of statutory exclusion, the court of appeals provided no test, no standard, and no definition to support what is in effect a gaping hole, ripped without the slightest statutory authorization, into the protective fabric of §2(3) of the Act.

A. A Judicially-Legislated Exception For "Paid Union Organizers" Is Neither Defined In Current Law Or Practice, Self-Defining, Or Easily Defined

The lower court's denial of statutory protection to employees "under the control of the union" has no basis in either the language or legislative history of the NLRA, and has never been employed for this *or any other purpose* by the Board. Indeed, the far narrower term "paid union organizer" has no meaning whatever in labor law. The Board

does not, and need not, define it for any other purpose.

To the contrary, the Board has consistently extended the protections of the Act to employees in the same posture as the employees in this case. While the Board was able to trace such protection only as far back as *Oak Apparel, Inc.*, 218 NLRB 701 (1975), this is assuredly *not* because paid union organizers in the court of appeals' loose sense -- employees and applicants receiving union encouragement -- have not been liberally sprinkled through the Board reports. Rather, such employees were always accepted as statutory employees; their precise arrangements with the unions to which they belonged were of no interest to the Board or litigating parties and no precise findings were made.

Botany Worsted Mills, 4 NLRB 292, 297 (1937), stands out from early Board cases only in that the issue surfaced obliquely. An employee named Joseph Peidl had been employed for about two years when he began organizational work for the union and was discharged. The Board found the discharge to be discriminatory under what is now §8(a)(3) of the NLRA. The employer had alleged to employees that Peidl was being compensated by the union for each member signed up. The employer, however, did not press the point before the Board, and the Board made no findings whether or not Peidl was being paid. Under the Eighth Circuit's approach, if Peidl actually received compensation from the union, the case was wrongly decided. The same might be true if Peidl were simply having certain organizing expenses reimbursed by the union, if the union provided Peidl with small amounts to pick up drinks for employees, or if the union paid bus fare for employees testifying before the Board.

No doubt, if the approach of the court of appeals were permitted to stand, the Board might evolve decisions that, over time, would articulate the quantum of union support

that would render a hapless employee into a nonemployee. The Board, however, would likely undertake this articulation through case-by-case adjudication, and could not be compelled to undertake it by rule-making, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974)(Board may exclude managerial employees from statutory protection through case-by-case litigation). Under this process, significant organizational activity might be chilled for a substantial period of time under a vague and sweeping rule that has no basis in the statute itself.

B. A Denial Of Protection Would Invite Abuse Of The Hiring Process That This Court Has Condemned In Other Contexts, Including Reliance By Employers On After-Acquired Evidence To Justify Discharge

Respondent refused to interview most of the electricians who applied to work for it because, the Board found, the electricians were union members. The Eighth Circuit set aside this Order, on the ground that the applicants were "under Local 292's control," in the sense that the union might reimburse them for any difference between union wages and Town & Country's, and could also direct the electricians to leave the job. Nothing in the record shows, however, that when Town & Country refused to interview the union members, telling them through its agent that the job was nonunion, it knew about either the possibility of reimbursement or the union's encouragement of these electricians to apply for nonunion work.

This case, then, is in the identical posture as *McKennon v. Nashville Banner Pub. Co.*, __ U.S. __, 115 S.Ct. 879, 883-85 (1995), in which the Court made clear that an employer cannot justify discrimination under the Age Discrimination in Employment Act on the basis of after-acquired evidence of employee wrongdoing. There is no

reason for a different result under the NLRA, and for this reason alone the decision of the court of appeals cannot stand. This corresponds not merely to the holding in *McKennon*, but to this Court's express rationale:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance. The efficacy of its enforcement mechanisms becomes one measure of the success of the Act.

115 S.Ct. at 885. This language applies with even greater force to the discrimination practiced by Town & Country. Unlike the plaintiff in *McKennon* who was suspected of wrongdoing, the discharged individuals here were engaged in statutorily protected activity. Moreover, as in *McKennon*, protecting these employees against discriminatory discharge does more than simply enforce individual rights; it protects the process by which respondent's discriminatory practices come under the light of public scrutiny.

C. Refusing To Accord Protection Would Chill Legitimate Employee Activity That Congress Plainly Meant To Protect

If permitted to stand, the decision below would substantially chill the right to self-organization, a right which Congress intended, under the NLRA and cognate federal labor

laws, to protect against employer retaliation. The Board uses the example, in its brief, of a longtime employee of a nonunion establishment who could lose his status as a statutory employee should he begin organizing, in a way that involved either financial remuneration from a union or placed him in a position which the decision below vaguely termed "under [union] control."

Consider another hypothetical employee who believes himself to be a victim of discrimination under the civil rights laws. He seeks advice from a civil rights organization in which he has been active. They tell him that his employer's treatment of him does indeed appear discriminatory, and they urge him to keep pressing for the promotion which he believes he has been discriminatorily denied. When he expresses concern that he may be fired, they assure him that they will place him on the staff of the civil rights organization if necessary to tide him over.

Under the Eighth Circuit's approach, this innocent exchange would destroy the employee's status as an employee and deprive him of protection against wrongful discrimination. While pressing for the promotion is plainly in the employee's own interest -- as it was in the interest of unemployed electricians to be hired by Town & Country -- it is just as plainly an action taken at the urging of a civil rights organization and includes a promise of financial support, should this be necessary. While the hypothetical civil rights victim has not bound himself to leave his job at the behest of the civil rights organization, he has agreed to a course of conduct that may in fact result in the termination of his employment. But to term this employee "under the control" of the civil rights organization for trying to ensure that enforcement of his legal rights did not result in his financial

ruin would turn the civil rights laws on their head.[4]

The Eighth Circuit did not specify the precise nature and limits of the hole that it tore into the NLRA. Perhaps it meant to create a test under which the Act's protection depends on the motive under which an employee applies for a job. A motivational test is of course nowhere present in the statute that Congress enacted. Such an approach, moreover, would invite endless litigation on the subjective motivation of employee job applicants.

V. The Employer's Asserted Interests In Discriminating Against The Affected Individuals Lack Legitimacy

This Court has repeatedly recognized that the employee's right to self-organize and to receive information about unions must be balanced against the legitimate property and managerial interests of the employer. Thus, in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court found that, although "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others," an employer may nevertheless bar nonemployee organizers from trespass on company property. *Id.* at 113 (1956); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

In this case, Town & Country has advanced no property right that would warrant its discriminatory hiring and firing

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[4] Because many civil rights laws are designed to protect the rights of "employees," the implications of the Eighth Circuit's reasoning are potentially far-reaching. For example, federal law protects "employees" in the workplace from sexual harassment, unsafe working conditions, and the use of polygraphs. Although Congress has not defined the term "employee" in precisely the same fashion in every statute, the definition of the term "employee" under the NLRA is as broad as any.

of union members. Indeed, establishing such a property right would be difficult, since the employer was hiring workers to perform renovation work on someone else's property. Town & Country nevertheless argues that this Court's decisions in *Babcock* and *Lechmere* give it an absolute right to exclude union organizers from a job site, even when no property interest is implicated and exclusion would interfere with the employees' right to receive information about unions. The unions in *Babcock* and *Lechmere* sought the right to trespass on private property. In the present case, however, the union member-applicants did not seek the right to infringe any legal right of the employer, much less a license to violate the criminal law. All they sought was the right to be treated on par with nonunion members when they applied for a job for which they were qualified. This request is not even remotely comparable to that made in *Babcock* and *Lechmere*.

The employers' conduct in *Babcock* and *Lechmere* was also completely different from that of respondent. The employers in those cases did not discriminate against unions or their message. They merely applied a neutral rule against solicitation on company property to all outside organizations, regardless of their interests or message. Town & Country, by contrast, claims the right to discriminate against anyone who might speak favorably about unions. The right of the employers in *Babcock* and *Lechmere* to enforce a neutral rule against solicitation in no way creates a right for Town & Country to discriminate against those who carry a message about unions that respondent dislikes.

Moreover, Town & Country's *per se* rule of exclusion for employees who receive some kind of support from the union simply jettisons the careful balancing approach that this Court endorsed in *Babcock* and *Lechmere*. This balancing process is essential, as this Court has consistently recognized in a wide variety of contexts. By attempting to remove complainants from the statutory definition of employee, Town & Country is attempting to avoid the balancing of interests that both *Babcock* and *Lechmere* require.

Nor can respondent point to any legitimate managerial interest in avoiding union organizers or supporters as employees. The Eighth Circuit expressed concern that union organizers and supporters would not function as good employees. Certainly if this turned out to be the case, they may lawfully be fired, as the Board has not hesitated to hold. *Sears, Roebuck & Co.*, 170 NLRB 533 (1968)(no violation of NLRA to discharge union organizer for economic reasons). The Board found, however, that union organizers are generally good employees, for "engaging in conduct warranting discharge would be antithetical to their objective" of organizing the employer. 309 NLRB at 1257. While social science evidence on the job behavior of union organizers is probably unavailable, the Board's assessment, which is at least rational, is in fact closer to the unvarying accounts by organizers themselves:

> I got Essie into the union. When she saw that I really wasn't a slacker and that I would keep up my end I won her respect. You had to *earn* the respect of your fellow workers or you couldn't talk to them about new ideas, or unions, etc. You always had to be a good worker.

Union organizer Stella Nowicki, describing her experiences at Swift's in Chicago in the 1930s, in RANK AND FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS 82 (Alice & Staughton Lynd eds., 2d ed. 1981).

The decision below further suggested that hiring individuals who might leave employment at the behest of a union interfered with respondent's managerial interest, because an employer "should not be required to place and re-

tain on its payroll those whose continued presence on the job will be determined by an entity other than itself." Of course, this did not happen in this case and, as with all matters concerning the applicants' arrangements with the union, cannot be shown to have been known to Town & Country at the time of its discriminatory refusal to interview. Certainly in the form put by the court of appeals, the proposition is too broad. For example, one is not less an employee if one has agreed in advance that one will quit a job, should the need arise, at the request of one's spouse or ailing parent.

Likewise, the employer's managerial interest in this case was jeopardized only if union organizing and union association are antithetical to the employer's running of his own business. But, it is precisely this premise that Congress and this Court have explicitly and repeatedly rejected. As the Board put it:

> The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.

309 NLRB at 1257.

It may be argued that employers nevertheless have a right to insist on "loyalty" that paid union organizers cannot give. This proposition cannot, however, be easily translated into labor law as this Court has developed it. In particular, "loyalty" is a term of art in labor law, used by this Court in two precise meanings. First, "loyalty" is what characterizes managers and supervisors who are not employees. Because employers may expect "loyalty" from some managerial personnel, they are not employees and may be kept from bargaining through unions. *NLRB v. Yeshiva University*, 444

U.S. 672 (1980). Employees, by definition and in contrast with managers, do not have this duty of loyalty that precludes bargaining through unions. Second, statutory employees have a much narrower duty of loyalty that precludes participation in certain unprotected tactics, specifically, public disparagement of the employer's product. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953). The court of appeals did not use "loyalty" in either of these accepted meanings, and its addition of a new and unprecedented meaning to "loyalty" could reduce the whole structure of labor law to incoherence.

In the end, the sole interest of Town & Country in excluding union sympathizers -- whether paid organizers, "salted" applicants, or reimbursed staff -- is its desire to remain nonunion. This is a legitimate desire when the issue is a speech to employees, or other rational persuasion. It is not, and has not been since 1935, a legitimate reason for discrimination in hire or discharge. A contrary holding would remove the decision whether or not to unionize from the employees in whom Congress vested it, to the employers who exercised that decision before 1935. This Court, however, should have some reason to reject sixty years of labor law other than the fact that some employers would prefer to remain nonunion.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to reverse the judgment of the decision below, and to order enforcement of the Board's Order.

Respectfully submitted,

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